

DOCUMENT RESUME

ED 251 833

CS 208 673

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TITLE Mailability v. the Crusader: Williams v. O'Brien.
PUB DATE Oct 84
NOTE 37p.
PUB TYPE Information Analyses (070)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Censorship; Constitutional Law; *Court Litigation;
*Freedom of Speech; *Government Role; Intellectual
Freedom; Journalism; Legal Responsibility; *Media
Research; Periodicals

IDENTIFIERS Crusader (The); Postal Service; *Prior Restraint
(Censorship); *Williams v O'Brien

ABSTRACT

The issues of prior restraint and press censorship are examined in this paper, which focuses on the 1970 Williams v. O'Brien court case. The paper discusses the litigation, in which Robert F. Williams, as an American citizen living in Peking, China, sued the United States Postmaster General over the banning of the May 1967 issue of "The Crusader," a periodical he published and distributed to the United States and other countries from Peking. (The Postmaster General had banned the issue citing an act of congress that provides for the nonmailability of matter tending to incite arson, murder, or assassination, and other national security related provisions of the United States.) The first section of the paper traces the history of postal censorship in this country from the Washington administration forward, and then presents a detailed exposition of the plaintiff's arguments--that the breadth and vagueness of the censorship statutes put them in violation of First and Fifth Amendment freedoms, and that no notice or judicial hearing to determine mailability was provided for in these statutes. The defendant's answer follows, leading into an explanation of the decision rendered by a three-judge panel of the U. S. District Court for the District of Columbia. A concluding section discusses the parallels between this case and the subsequent Pentagon Papers case (New York Times v. United States), and raises the question of whether "The Crusader" and its publisher were victims of a de facto bill of attainder. (RBW)

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Mailability V. The Crusader: Williams V. Obrien

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MAILABILITY V THE CRUSADER: Williams v. Obrien

CASENOTE

Constitutional Law: Mailability. The Postmaster General may not summarily impound, detain nor censor mail between U. S. citizens regardless of their location. Fifth Amendment due process and First Amendment considerations of freedom of expression require a full administrative hearing and opportunity for judicial review. Williams v. Obrien (D.C. Ca. No. 840-68) unreported. Decided Aug 1970. Appeal withdrawn, Dec. 1970.

MAILABILITY V. THE CRUSADER

Williams v. O'Brien

The United States may give up the Post Office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues, and it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man. United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 437 (1921), Holmes, J., dissenting.¹

Concerns about the conflict between Freedom of the Press and mail censorship are nearly as old as the republic itself and this paper will focus on a little-published case, Williams v. O'Brien, D.C. CA. No. 840-68, which raises questions of unconstitutional conditions surrounding press censorship by the Post Office Department, and the issue of prior restraint. Professor Jay Sigler who has explored the early developments of postal censorship, has pointed out a long line of censors from Plato's day to the present.² According to Sigler, Miltons Areopagitica would oppose the concept of prior restraint while supporting subsequent punishment. As Milton put it, the authors of mischievous works could be dealt with, after publication, by fire and the executioner.³ President George Washington had opposed postal censorship,⁴ but during the Jackson Administration the Incendiary Publications Bill of 1835⁵ was proposed to curtail slave rebellions by restricting types of mail allowed in postal bags. The bill was defeated in the Senate over the issue of freedom of the press. Then Senator and later President Buchanan "argued for a broad grant of Federal Authority. He said that it must be proven that freedom of

the press commands us to circulate and distribute through our post offices, everything which the press shall publish, no matter whether it shall promote insurrection and civil war or not."⁶

In 1842 Congress passed its first postal censorship legislation, the Customs Law of 1842, a statute which gave the customs service power to prohibit "indecent and obscene" visual art.⁷ And censorship of the printed word was enacted in 1879 by what Sigler describes as a "doubtful Congress". That bill was delayed over the issue of possible free speech violations pertaining to a second-class mailing privilege extended to "only such publications as will disseminate intelligence and be for the highest good of the whole people."⁸

A section permitting postal censorship was included in the Espionage Act of 1917⁹ which prohibited as nonmailable every letter, newspaper, or other publication "advocating or urging treason, insurrection, or forcible resistance to any law of the United States."¹⁰ The constitutionality of the statute as asserted by Circuit Judge Rogers indicated the legitimacy of separating the First Amendment from use of the mail:

Clearly the Espionage Act imposed no restraint prior to publication, and no restraint afterwards, except as it restricts circulation through the mails. Liberty of circulation may be essential to freedom of the press, but liberty of circulating through the mail is not (essential) so long as transportation in any other way as merchandise is not forbidden. Masses Publication Co. v. Patten, 246 Fed. 24, 27 (2d Cir. 1917).

The pendulum later swung the other way, however, and the current view as expressed in a dissenting opinion of Mr. Justice Harlan in Roth v. United States, "the hoary dogma...that the use of the mails is a privilege on which the Government may impose such conditions as

it chooses, has long since evaporated."¹¹

If not all mail is considered a privilege, there is still a great debate over the question of second-class mail which Congress subsidized to promote the flow of certain types of public information through the Postal Clause of the Constitution.¹²

Areas that have been specifically banned from the postal flow include fraudulent schemes, poisons, explosives, contraceptives, and¹³

even unsigned political election campaign mail during an election.

A larger problem has been regulation of obscenity including the identification and due process application by the Administrative agency.¹⁴

The older view as expressed by Judge Rogers¹⁴ and Mr. Justice Fields, was that the Postal Authorities were competent to decide all issues of mail traffic since the mail and the First Amendment were thought to be distinct.¹⁵

The modern view is that at least some mail issues should be left for the Court to review. Those issues include the process of decisionmaking, who should decide, and the prospective application of a decision of a citizens right to use the mails. As Mr. Justice Brandeis explained in 1921, "Undoubtedly, the Postmaster General has latitude of judgment in deciding whether a publication meets the definition of a newspaper laid down by the law, but the Courts have jurisdiction to decide whether the reasons which an administrative officer gives for his actions agree with the requirements of the statute under which he purports to act."¹⁶

In 1962 Congress prohibited "Communist Political Propaganda" from the mails unless the recipient expressly requested such, but the Supreme Court declared the statute unconstitutional as construed and applied because it was a limitation on the "unfettered exercise

of the addressee's First Amendment rights.¹⁷ There Mr. Justice Douglas recalled the dissenting opinion of Mr. Justice Holmes in Milwaukee Publishing as well as the view of the New York Times v. Sullivan.¹⁸ As Mr. Justice Douglas put it, the regime of this Act is at war with the "uninhibited, robust, and wide-open" debate and discussion that are contemplated by the First Amendment.

But Congress struck back in 1964 with another Postal amendment which sought to restrict fraudulent and seditious material from the mail.¹⁹

Section 957 of the Act provides that:

Whoever, in aid of any foreign government, knowingly and willfully possesses or controls any property or papers used or designed or intended for use in violating any penal statute, or any of the rights or obligations of the United States under any treaty or the law of nations, shall be fined not more than \$1,000 or imprisoned not more than ten years or both.

Section 1461 declares as nonmailable:

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance... (the term 'indecent' as used in this section includes matter of a character tending to incite arson, murder, or assassination).

Section 1717(a) declares nonmailable:

Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing, in violation... or which contains any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States is non-mailable and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Section 1717(b) provides that:

Whoever uses or attempts to use the mails or Postal Service or the United States for the transmission of any matter declared by this section to be nonmailable, shall be fined not more than \$5,000 or imprisoned not more than ten years or both.²⁰

Section 2387 provides that:

(a) Whoever, with the intent to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States:

- (1) advises, counsels, urges, or in any manner causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States; or
- (2) distributes or attempts to distribute any written or printed matter which advises, counsels, or urges insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States.

shall be fined not more than \$10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

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These amendments focusing on national security concerns were challenged on First, Fourth, Fifth and Ninth Amendment grounds in the 1970 case, Williams v. O'Brien, supra. This class action was commenced by Robert F. Williams, an American citizen living in Peking, China, who published The Crusader, a periodical, which was distributed to the United States and other countries from Peking. Among the U.S. citizen recipients of the publication by first-class mail were Plaintiffs Conrad Lynn, former Attorney of Williams, and Lawrence Ferlinghetti, President of City Light Books, Inc., a California Corporation engaged in the publication of books and the distribution and sale of books and publications. The third Plaintiff was Christopher Koch, at the time a faculty member of Bennington College, Vermont, who argues that he used The Crusader in his research and writing.

Acting under the authority of 18 U.S.C. §§ 957, 1461, 1717(a) and 2387 but relying primarily on the provision in 1461 which provides for the nonmailability of matter tending to incite arson, murder or assassination, the Postmaster General on August 29, 1967, ordered the May 1967 issue banned as an item of foreign mail. This action was taken after government officials, including President Lyndon B. Johnson and certain private citizens submitted copies of the issue to postal officials for review.

In the U.S. District Court for the District of Columbia, Plaintiffs sought an injunction to restrain the operation "of an entire postal censorship scheme established by Act of Congress", arguing that the censorship was a violation of the First and Fifth Amendment freedoms, because of impermissible breadth and vagueness. For example, the words "tending to incite" (18 U.S.C. § 1461), "urging" (18 U.S.C. § 1717, "urges", "advises" (18 U.S.C. § 2387). Plaintiffs' vagueness argument cited, among others, New York Times v. Sullivan, 376 U.S. 254 (1964).

Further, Plaintiffs argued that the criminal statutes provided for no notice nor judicial hearing to determine nonmailability, nor an administrative hearing that would satisfy the test of Manual Enterprises, Inc. v. Day, 370 U.S. 478, 500, 519 (1962) (concurring opinion) and Lamont v. Postmaster General, 381 U.S. 301 (1965).

Plaintiffs also argued that the declaration of nonmailability could cause the Plaintiffs and others to apprehend a fear of criminal prosecution of identification in government files as "subversive" as a consequence of receiving and circulating The Crusader,²² and that

the declaration of nonmailability regarding matter distributed by an American citizen abroad tend to deter him from returning to his homeland, or in the alternative, to refrain from speaking freely abroad, or both.²³

Plaintiffs argued that none of the statutes expressly relied upon by Defendant included an express or implied grant to the Postmaster General of any authority to stop or censor mail, neither to scrutinize mail except to determine whether criminal prosecutions should be brought. Here, Plaintiffs relied upon Manual Enterprises, Inc. v. Day,²⁴ where, examining postal censorship of allegedly "obscene" matter under Section 1461, those Justices ruled that the provision "did not authorize any administrative censorship."²⁵ Further, Plaintiffs pointed out that Congress had expressly repealed subsection (c) of Section 1716 which had previously authorized postal employees of the dead letter office to open mail subject to Section 1717(a) and (b). 74 Stat. 708, 1960.

According to Plaintiffs, this case was not the first time that the Postmaster General "has pulled himself up by the boot-straps of criminal or other statutes to justify censorial power where none was granted."²⁶ Plaintiffs then proceeded to list the line of cases where administrative censorship had not been overturned by the court and were based upon the same four statutes, not only for being "lewd and obscene", but for political dissent. The list included the withdrawal of the second-class postal privileges of the New York Call under a precursor of 1461, upheld in Burleson v. United States ex rel. Workmen's Co-op Publishers Ass'n.,²⁷ the withdrawal of second-class postal privileges was again upheld under provisions of the Espionage

Act of 1917, a predecessor of Section 1716, in United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407 (1921). The list also included the case of the Masses newspaper which had been declared by the Postmaster General to be nonmailable under a predecessor of Section 1717, and the Postmaster Generals' consequent exclusion of Masses from the mails was upheld against a prayer for injunctive relief, Masses Pub. Co. v. Patten, 246 Fed. 24 (C.C.A. 1917).

That line of cases, argued Plaintiffs, needed to be clearly overruled because of recent decisions of the Supreme Court and of lower federal courts, had severely undercut the early cases supporting broad, administrative, censorial power over the United States Mails.

The early cases had been premised on a "gross fallacy, that use of the mails is a privilege, not a right, and therefore constitutional protections need not be scrupulously regarded." ²⁸ Even so, argued Plaintiffs, two of the decisions, Burleson and Milwaukee Social Democratic Club supra, involved the withholding of the "privilege" of second-class mail status, and not outright exclusion of publications. But the courts today, reasoned Plaintiffs, have rejected the conceptualistic "privilege-right dichotomy when governmental action impinges, directly or indirectly, on critical democratic interests, particularly those contemplated in the First Amendment. ²⁹

Overbreadth And Vagueness

Plaintiffs argued that under the standards of vagueness and overbreadth, "the criminal provisions relied upon by the Postmaster General to exclude the May 1967 issue of The Crusader were clearly

unconstitutional." In Plaintiffs view, some of the provisions were "too vague, lodging administrators with too much discretion; some were too broad, proscribing that which may not be proscribed as well as that which may be proscribed; and some provisions suffer both maladies."³⁰ For the precedent of vagueness, Plaintiffs cited Smith v. California, 361 U.S. 147, 151 (1959), and for overbreadth, Keyishian v. Board of Regents, 385 U.S. 589, 609 (1967). Both principles, said Plaintiffs, are most strictly applied to statutes having a potentially inhibiting effect on First Amendment rights, for fear that otherwise "the free dissemination of ideas may be the loser." Smith v. California at 151.

In addition, plaintiffs cited another 1967 Supreme Court decision, United States v. Robel, 88 S. Ct. 419 (1967). In Robel the Court declared unconstitutional Section 5(a)(1)(D) of the Subversive Activities Control Act of 1950, which made it unlawful for any member of a "communist action" organization under a final order to register "to engage in any employment in any defense facility." The Court held that the statute in violation of the First Amendment, "contains the fatal defect of overbreadth because it seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights." 88 S. Ct. at 425.

Earlier the Court had struck down another section of the same Act in Aptheker v. Rusk, 378 U.S. 500 (1964) where the Court had considered the constitutionality of Section 6 of the Act, 50 U.S.C. § 785 which made it unlawful for any member of a "communist action organization" under a final order to register "to make application

for...(or) use or attempt to use any...passport" issued under the authority of the United States. The Court said, "that section sweeps too widely and too indiscriminately across the liberty included in the right to travel guaranteed in the Fifth Amendment." 278 U.S. at 514.

As applied in this case as a ground for administrative censorship, 18 U.S.C. § 957, argued Plaintiffs, is unduly vague because of the use of terms such as "in aid of any foreign government" and "to knowingly and willfully possess or control" any property or papers used or designed or intended for use in violation of any penal statute, or any of the rights or obligations of the United States under any treaty of the law of nations..." In addition, asserted Plaintiffs, these criminal statutes do not involve a criminal prosecution at this stage, where the government must prove, and the judge must charge with respect to, specific intent. In Plaintiffs view, the present case involves an administrative act of censorship, a "prior restraint in derogation of First Amendment rights." But here, "no judge sits to see that specific intent was proved before the May issue of The Crusader was suppressed. Obviously suppression follows a mere administrative determination, without regard to mens rea, that the publication in question is per se bad or in violation of Section 957.

In this in rem proceeding, the Postmaster General, argued Plaintiffs, has put those who would use the mails to convey and those who would use the mails to receive The Crusader to the impossible burden condemned in Screws v. United States, 325 U.S. 91 (1945) of reviewing "a comprehensive law library in order to ascertain what acts were prohibited." 325 U.S. at 96. If this is what Congress intended by

Section 957, argued Plaintiffs, it has lodged in the Postmaster General an unfettered discretion, capable of arbitrary exercise, stifling of protected First Amendment freedoms. In effect, said Plaintiffs, it gives the Postmaster General an unrestrained licensing power over speech. Moreover, asserted Plaintiffs, the operative terms "advises, counsels, urges" is not limited to immediacy or to non-abstract advocacy of action. In passing upon a statute which also attached criminal and administrative sanctions to mere 'advising' the Supreme Court said in Keyishian v. Board of Regents:

This provision is plainly susceptible of sweeping and improper application. It may well prohibit the employment of one who merely advocates the doctrine in the abstract without any attempt to indoctrinate other, or incite others to action in furtherance of unlawful aims.

Further, argued Plaintiffs, as applied by the Postmaster General, subsection (a)(2) is not limited in scope to distribution or attempts to distribute the matter in question to persons likely to act upon it.

The second major argument of Plaintiffs was that Congress may not constitutionally authorize any process other than a fully judicial one to exclude, on the grounds of content, written matter from the United States mail. Here, Plaintiffs cited the concurring opinion of Mr. Justice Brennan in Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962), where the Chief Justice speaking for himself and Mr. Justice Douglas, doubting that Congress may constitutionally authorize any process to close the mails to particular matter because of written content. Justice Brennan raised three questions that Congress or the Courts would have to deal with sooner or later. They included:

(a) whether Congress can close the mails to obscenity by any means other than prosecution of its sender; (b) whether Congress, if it can authorize exclusion of mail, can provide that obscenity be determined in the first instance in any forum except a court; and, (c) whether, even if Congress so authorized administrative censorship, it has in fact conferred upon postal authorities any power to exclude matter from the mails upon their determination of its obscene character.

It was the latter question upon which that case was settled.³² After expressing great doubt about the Postal authorities to censor mail for obscenity, Justice Brennan continued:

We have emphasized, however, that the necessity for safeguarding First Amendment protections for nonobscene materials means that government 'is not free to adopt whatever procedures it pleases for dealing with obscenity... without regard to the possible consequences for constitutionally protected speech.' Marcus v. Search Warrent, 367 U.S. 716 (1961).

...I imply no doubt that Congress could constitutionally authorize a noncriminal process in the nature of a judicial proceeding under closely defined procedural safeguards. But the suggestion that Congress may constitutionally authorize any process other than a fully judicial one immediately raises the gravest doubts. However, it is enough to dispose of this case that Congress has not, in § 1461, authorized the Postmaster General to employ any process of his own to close the mails to matter which, in his view, falls within the ban of the section. See Manuel Enterprises, Inc., supra.

The second major case cited arguing for judicial process rather than administrative censorship was Freedman v. Maryland.³³ In that case, Justice Brennan, speaking for the full Court, invalidated a Maryland system of administrative film censorship that placed the burdens of proof, proceeding and appeal onto the censored party. Justice Brennan not only required that the burden of proof be shifted

to the state:

Where the transcendent value of speech is involved...., but held also that only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint....to this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to Court to restrain showing the film...an interim determination in advance of a final decision must be speedy and lead to a prompt final judicial decision "to minimize the deterrent effect of an interim and possibly erroneous denial of a license." See also, Bantam Books, Inc. v. Sullivan, *supra*; A Quantity Of Books v. State of Kansas, 378 U.S. 205 (1964).

Plaintiffs third major argument was that by his application of the criminal statutes in question, the Postmaster General has effected an in rem suppression of written utterances, without regard to relationship to unlawful action in derogation of the First Amendment.

Since the Court has gone to such lengths to guarantee due process and First Amendment protections to determine whether or not contested speech was protected surrounding obscenity issues, Plaintiffs now raise the question: Can political dissent, which is found at the very core of the rights protected by the First Amendment, be amenable to greater suppression than obscenity? Here, argued Plaintiffs, the Postmaster Generals' action affects an in rem suppression of The Crusader, a journal of political dissent. But, said Plaintiffs, such publications may not, consistent with the First Amendment, be suppressed as though they are public nuisances.

Absent proof that The Crusader's writings are solicitations to unlawful action, said Plaintiffs, or proof that they are the instruments of active participation in a dangerous conspiracy (see Yates v. United

States, 354 U.S. 298 (1957); the government has no power to curtail his freedom to write down, disseminate, and advocate his political beliefs and ideas, even those that are considered hateful or immoral by the contemporary community. Furthermore, argued Plaintiffs, the Postmaster General's action constitutes "an even more dangerous 'limitation on the unfettered exercise of the addressees' First Amendment rights" than was invalidated in Lamont v. Postmaster General,³⁴ where the Court upheld Plaintiffs' right to receive the "foreign communist political propaganda" in question. The case at bar, argued Plaintiffs, involves no fighting words, are usually transported under first-class seal, and involve no captive audience. In Plaintiffs' words, before these utterances could possibly spark any action or reaction, harmful or otherwise, before they could possibly take fire, they must be read and the reader must make some intellectual, and not merely emotional or spontaneous, connections. Such utterances urged Plaintiffs are entitled to the absolute protection of the First Amendment.³⁵ Plaintiffs also argued that by suppressing the May issue of The Crusader and continuing surveillance of subsequent issues, all of which have been entered as sealed first-class mail matter, the Postmaster General has unconstitutionally invaded the Plaintiffs' constitutional rights to privacy.³⁶

Defendants Answer

Overbreadth

Defendants' answer first challenged the allegation of overbreadth and vagueness of the four statutes, saying that the statutory construction before the Court should reach only "advocacy of unlawful

action." Section 1461, said Defendant, reaches only writings tending to incite arson, murder or assassination. Furthermore, the use of the phrase "tending to incite" does not render the statute overbroad or vague because Courts narrowly construe "tendency" statutes to encompass only a call to unlawful action.³⁷

Sections 957 and 2387 should reach only writings advising, counseling or urging the violation of a penal statute in the aid of a foreign government -- here, advising, counseling or urging refusal of duty by members of the armed forces. The use of the words "advises, counsels or urges" argued Defendant does not render the statutes overbroad or vague because these words have long been used to describe an accessory to a crime.³⁸

Section 1717(a) reaches only writings which contain matter advocating or urging treason, insurrection or forcible resistance to any law of the United States, argued Defendant. The use of the words "advocating or urging" does not include abstract advocacy and, in Defendant's view, may be properly construed by the Court to reach only advocacy of unlawful action.³⁹

Nonmailability

Under the four sections of the aforementioned Act, Defendant argued, the Postmaster General has the authority to declare nonmailable the May 1967 edition of The Crusader based entirely on the content of the publication. The portions of the issue of The Crusader which counsel the use of arson in an insurrection in America during the Vietnam war are sufficient to render that issue nonmailable under Section 1461 as being matter of a character tending to incite arson, murder or

assassination, and renders it nonmailable under the insurrection clause of Section 171(a).

Defendant contends that the portion of the May 1967 issue of The Crusader which urges Blacks to support the Vietnamese liberation struggle for a "clear-cut victory of the freedom fighters of the people's liberation Front", and the urging of Black soldiers to refuse to fight in Vietnam, are sufficient to hold that issue to be a paper "in aid of any foreign government" within the meaning of Section 957, supra. These Crusaders' content also falls within the meaning of urging or counseling refusal of military duty as stated in Section 2387. Both characterizations fall within the concept of a paper "used or designed or intended for use in aid of any foreign government in violating "any penal statute."⁴⁰

In Defendants view, the May 1967 issue of The Crusader is a call to unlawful action because the readers are urged to do something, not merely believe in something. No interpretation of the words used is required, argues Defendant, to fathom the intention and meaning of the utterances, hence this is no abstract advocacy and can be gleaned entirely from the contents of the publication.

Ultra Vires

The actions of the Postmaster General and other officers of the government have not exceeded the duties of their offices, asserts Defendant. There has been no opening of sealed mail, no censorship, and no deletions from any text of The Crusader. Neither has Plaintiff Williams been required to submit any issue of The Crusader for prior review, much less to obtain a license or clearance to mail The Crusader. The Post Office Department does not issue licenses, only

preferential postage rate permits, which are not involved here, Defendant contends.

Prior Restraint

In addition, Defendant argues that there has been no prior restraint since the Post Office Department has not sought to ban any issue of The Crusader prior to its actual deposit in the mail. On the contrary, the object of a nonmailability ruling is to proscribe in rem only that particular item in violation of the Federal Statutes; not in personam against the sender or in rem against future publications by that sender.

Defendant asserts total compliance with the Court ruling in Lamont v. Postmaster General, supra, which banned the requested delivery of mail determined by the Postmaster General to be "communist Political Propaganda" prepared in a foreign country. According to Defendant, that program was then terminated and never revived, nor was The Crusader banned under the criteria of that statute.

There is no basis in the record for the Court to conclude that any agency of the government has "scrutinized" the May 1967 or any other issue of The Crusader, said Defendant, although it was conceded that the Post Office Department has examined issues referred by postal patrons to the Post Office Department -- but this is with the consent of the addressee. And, there has been absolutely no detention of the May 1967 or any other issues of The Crusader, although the Department has retained for its files a copy of the May 1967 issue in connection with its nonmailability ruling with respect to the May 1967 issue as an item of foreign mail, added Defendant.

Defendant argues that there has been no discovery of The Crusader in the domestic mails and no action taken against the publication as domestic mail. Neither has the Post Office Department discovered any copy of the May 1967 issue of The Crusader in the foreign mails. So in spite of the nonmailability ruling with respect to this issue as an item of foreign mail -- which came about as a result of complaints of postal patrons with respect to the presence of the May 1967 issue in the foreign mails -- there has been no seizure or disposition of any copy of this issue as nonmailable foreign mail.

No Administrative Hearing required For Foreign Mail

The first major challenge asserted by Defendants was that no administrative hearing was required to determine the mailability of the May 1967 issue of The Crusader as an item of foreign mail. In this argument, the Defendant turned to international law, citing the Universal Postal Union Convention,⁴¹ (signed at Vienna, July 10, 1964, TIAS 5881).

Under various sections of that treaty, signatory nations are prohibited from sending mail to other nations where such mail is declared nonmailable, and mailability hearings are not required of the receiving nation.⁴² Further, Postal authority derives from provisions of 39 U.S.C. 505, declared Defendants. That statute authorizes that the decision of the "Postmaster General construing or interpreting the provisions of any...convention...shall be final and conclusive upon all officers of the United States." In addition, said Defendants, Congress has provided that matter seized or detained as nonmailable for violation of law shall be disposed of as the Postmaster General

directs. 39 U.S.C. 4001(b).

Here, Defendant reminds the Court that the Postmaster General has not in fact detained nor seized any copy of the May 1967 issue of The Crusader, but adds that Plaintiff Williams has "no rights under the Convention with respect to The Crusader mailed from Peking because China is not a party to the Convention." Defendant insists that even if China were a signatory to the Convention, nothing therein would give Williams the right to demand an administrative hearing of the question of the mailability of The Crusader as foreign mail, and no United States law or regulation requires a mailability hearing for the class of foreign mail typified by the May 1967 issue of The Crusader.⁴³

And since Plaintiff Williams has no right to a hearing, neither can the other Plaintiffs demand such because their rights can be no greater than that of Williams, argued Defendants, quoting from Cherry v. Postmaster General, 272 F. Supp. 982, 986 (D. Puerto Rico 1967) where the Court stated:

As far as the intervenor is concerned, we believe that his right to receive materials through the mails is dependent on the Plaintiff's right to send it through the mail. If Plaintiff cannot legally send it, it seems obvious that no one has the right to receive it...if the Postmaster General has the right to refuse to deliver an item, that is the end of it...

In addition, Defendant argued that the "right to know has no legal basis under international law since the Universal Declaration of Human Rights is only a declaration, not a treaty, and that the U.S. had no intention of signing a United Nations Human rights treaty."⁴⁴

Finally, Defendants argued that the administrative procedures applicable to determining the mailability of items of domestic mail

meet all the requirements of due process of law. (39 C.F.R. Part 953). A great distinction is made between the foreign and domestic procedures, the latter falling under domestic U.S. law and thereby have the right of the complete Constitutional protections of administrative law. These procedures, said Defendant, provide for the issuance of an administrative complaint (Section 953.4), an opportunity to answer (Section 953.7), an administrative hearing (Sections 953.9 - 953.13), and an administrative appeal from an adverse initial decision (Sections 953.14 - 953.15). In addition, said Defendants, a prior nonmailability determination made with respect to the matter as an item of foreign mail would in no way be considered by the judicial officer, or the hearing examiner at any hearing, under 39 C.F.R. Part 953 on the issue of mailability of that matter as an item of domestic mail, much less would the prior ruling be binding on them. These procedures were upheld in Cherry v. Postmaster General, supra, where the Court stated:

The Post Office Department held an administrative hearing and it was after this hearing that the ruling came as to the destruction of Plaintiff's postcards. There has been no showing by the Plaintiff as to why this Court should hold that his procedure is contrary to the due process of law or any other constitutional or legal right. Plaintiff's rights are fully protected and provided for in this procedure and there is no denial of due process merely because the courts of law do not intervene in the matter in the first instance. Public Clearing House v. Coyne, 1904, 194 U.S. 497, 24 S. Ct. 789, 48 L. Ed. 1092.

Defendant concluded that since no action had been taken against The Crusader as a matter of Domestic mail, the other Plaintiff recipients had no standing. And since the Postmaster General merely proceeded in rem against a single issue of The Crusader as a matter of foreign mail, Plaintiff Williams had no cause of action. Therefore, reasoned Defendants, the Court had no subject matter jurisdiction

for no claim nor controversy existed and courts could not adjudicate constitutional issues with no record of adverse administrative action.

Opinion Of The Court

A three-judge panel in the U.S. District Court for the District of Columbia included Circuit Judges McGowan and Robb, and District Judge Robinson. Counsel for Plaintiffs included the American Civil Liberties Union.

The central issue raised by the Court was whether the Postmaster General "employ different, substantially abbreviated procedures, when dealing with foreign mail than those he must employ with domestic mail where nonmailability is concerned." (Memorandum Opinion, p. 5). The Court discussed at length the procedure used by the Post Office Department to determine nonmailability for domestic mail, and found no problems with due process for that category of mail. However, when it turned to the question of Post Office Department determination and disposition of foreign mail between U.S. citizens, it found that the Post Office Department practice was to summarily seize, impound and detain foreign mail. Said the Court:

The mailability of foreign mail thought to violate the statutes at issue in this case is determined exclusively within the General Counsel's Office of the Post Office Department. The procedure which is followed consists of a memorandum opinion of mailability from the Assistant General Counsel of the Mailability Division to the General Counsel. The opinion cites the statutory and decisional law which the Assistant General Counsel feels controls the case. If that memorandum declares an item nonmailable, then postal officials may seize any copies of that item directed to domestic recipients from abroad.

Neither the senders nor the recipients participate in the process leading to the determination of mailability. Neither is informed that the Government suspects that the contents of the mail might violate certain penal statutes;

neither is afforded an opportunity to be heard on the question of mailability. The Department's procedures include no regular provisions for administrative or judicial review of its decisions as they pertain to foreign mail...for the reasons which subsequently appear, we hold that the Fifth Amendment's due process clause requires that the same standards...be applied to foreign mail between American citizens and that...determination of nonmailability of the May 1967 Crusader was improper.

The Court said that no express authority -- statutory, administrative, nor judicial decisions -- had granted the Postmaster General to summarily impound mail between U.S. Citizens, and therefore, such action was suspect. The Court then quoted Justice Douglas:

The power of the Post Office Department to exclude material from the mails and to intercept mail addressed to a person or a business is a power that touches basic freedoms. It might even have the effect of a prior restraint on communications in violation of the First Amendment, or the infliction of punishment without due process of law which the Fifth and Sixth Amendments guarantee....I mention the constitutional implications only to emphasize that the power to impound mail should not be lightly implied. Standard v. Olesen, 74 S. Ct. 768 (Douglas Circuit Justice, 1954). See Hannegan v. Esquire, Inc., 327 U.S. 146, 151 (1946); Kent v. Dulles, 357 U.S. 116, 129 (1958).

The Court went on to say that although the Postmaster General's supervisory powers over the mails flowed from the power of Congress, there were also constitutional limitations over Congressional action because of rights reserved to the people "of far greater importance than the transportation of the mail." Ex Parte Jackson, 96 U.S. 727, 732 (1877).

Congressional hearings concerning legislative proposal to specifically grant such powers to the Postmaster General also indicated that Congress had not intended such a broad grant of power, said the Court, regarding testimony of Deputy Attorney General White who expressed doubts as to the constitutionality of such a grant

particularly in the absence of notice and a hearing. And, said the Court, during the same hearing, Senator Clark stated that: "Any proposal which sets up a universal screening system for foreign mail, regardless of its exceptions, raises seriously constitutional questions."⁴⁵

U.S. Code Cong. and Ad. News, 87th Cong. 2d Sess. at 3076 (1962). The Bill was subsequently overruled in Lamont v. Postmaster General of the United States, 381 U.S. 301 (1965).

In addition, pointed out the Court, a Post Office Department manual published in 1939 stated that the Postmaster General had no power to summarily impound mail.⁴⁶ A year later, said the Court, the same position was taken in "a monograph of the Attorney General's Committee on Administrative Procedure, Post Office Department."⁴⁷

Turning to the international law argument raised by Defendant, the Court refused to accept that the Postal Convention was binding since it was neither passed by Congress nor ratified by the Senate, said the Court, the Convention was merely effective as an administrative regulation issued by the Postmaster General under the authority of U.S. law, and since the Supreme Court had emphasized that the Postmaster General could not employ whatever procedures he chose in dealing with prohibited matter, the Postmaster General had no alternative but to act consistently with domestic substantive and procedural law for standard of mailability.

Among others, the Court cited Reid v. Covert, 354, U.S. 1, 16 (1957), which stated that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government which is free from the restraints of the constitution. 354 U.S. at 16. Again, the Court denied the argument by Defense that a distinction could be made between foreign and domestic treatment of mail between

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U.S. citizens. According to the Court, "the Constitutional protection to which mail between American citizens is entitled is not dependent on whether the item was mailed in this country or abroad...what is of considerably greater importance is the effect of his actions on the constitutionally guaranteed free access to the mails by American citizens, and that effect is the same regardless of whether the citizen finds himself here or abroad. Again, quoting from Reid v. Covert, supra, Justice Black stated that "at the beginning, we rejected the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights." 354 U.S. at 5.

Although the trial court ducked the question of whether the contents of the May 1967 Crusader were protected, it also held that the actions of the Postmaster General violated the Fifth Amendment rights of the other Plaintiff - recipients of the newspaper. In the Court's view, an important function of the protection which the First Amendment affords writers or speakers is that of guaranteeing to potential audiences the untrammelled access to all possible information, ideas and views. It is this furtherance of this function, said the Court, that courts have held that a putative listener has rights which are entitled to judicial protection. Quoting the concurring opinion Lamont v. Day, supra, Mr. Justice Brennan stated:

I think the right to receive publications is...a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.

For these Fifth Amendment due process, and First Amendment concerns, the Court lifted the ban against The Crusader. The Government appealed to the Supreme Court but later withdrew the appeal. (D.C. CA. No. 840-6; Dec. 1970).

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Conclusion

With the benefit of hindsight, there are two aspects of the Crusader case, both speculative, that I will here explore. One is the question of how this case would have been decided a year later, after the Pentagon Papers case, New York Times v. United States, 403 U. S. 713; 91 S.Ct 2140 (1971) which raised many similar issues during an era of great social and political protest, both involving the Vietnam war. The second issue which will certainly emerge from the ashes of Cointelpro and other intelligence activities, is that The Crusader and its publisher, Robert F. Williams, were victims of a de facto executive Bill of Attainder.

In comparing the case of The Crusader with the Pentagon case, it is undisputed that there was no express authority from Congress for either executive summary impounding of mail, nor for the Courts to enjoin prior publication of a newspaper. Second, in both cases there was clear legislative history indicating Congressional disapproval of the aforementioned governmental conduct. For example, Mr. Justice Marshall pointed out in the Pentagon case that Congress had on at least two occasions, refused to enact legislation to grant injunctive powers in issues determined by the President to be dangerous to national security. According to Marshall:

In 1917 during the debate over the original Espionage Act, still the basic provisions of Section 793, Congress rejected a proposal to give the President in time of war or threat of war, authority to directly ban by proclamation the publication of information relating to national defense that might be useful to the enemy...See 55 Cong. Rec. 1764. Congress rejected this proposal after war against Germany

had been declared even though many believed that there was a grave national emergency and that the threat of security leaks and espionage were serious.

The second attempt to make criminal the publication of harmful national security information--however that is to be defined --was rejected in 1957 after substantial floor discussion on the proposal. See 103 Cong. Rec. 10447-10450.

Furthermore, as pointed out by Mr. Justice Douglas in the same case, the Act of September 23, 1950 in amending 18 U.S.C. Section 793--very similar to the statutes relied upon by defendant in Williams v. Obrien-- states in Section 1 (b) that:

Nothing in this Act shall be construed to authorize, require or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect."

Another issue which may be raised in such future litigation is the statement made by Justice Douglas in the Pentagon case concerning the War Powers clause of the President. Said Douglas, "the war power stems from a declaration of war. The Constitution by Article I Section 8, gives Congress, not the President, power to declare war." Nowhere are presidential wars authorized..." This concern would be relevant to both The Crusader and the Pentagon case since both represented anti-Vietnam war sentiments.

In addition, the majority of both courts argued against either prior restraint or summary mail prohibition, but both courts also left open the possibility of subsequent criminal punishment by judicial process if criminal violations by the press were found.

This latter was of particular concern to the dissent in the Pentagon case. Yet, not all the justices, however, would absolutely oppose prior restraint in the New York Times case. Justice Brennan pointed out that the Schenck exception should also apply to subsequent punishment, Schenck v. United States, 249 U.S. 47, 52 (1919), "during which time no one would question but that a Government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number or location of troops. Near v. Minnesota, 283 U.S. 697, 716 (1931).

Although the government had argued that publication of the Pentagon Papers presented some danger to national security, the majority of the Court was not convinced that the alleged danger was more than speculative, and at any rate, had not overcome the obstacle of the First Amendment. Likewise, in The Crusader case, the Government's assertion of dangerous writing was not compelling enough to overcome the obstacles of due process in the Fifth Amendment, nor First Amendment considerations of freedom of expression. In neither case did the Court seriously address the issue of content, but left that problem for a criminal court if the Government sought to so proceed.

A final problem in Williams, not present in the Times, and which neither party raised ⁱⁿ The Crusader briefs, was that the modern use of the mails for small publications, and specifically for foreign publications, is that the mail may be the only timely means of distribution. That problem was not a real one for the publicists at the time of drafting the First Amendment, since those writers could simply post their literature in the public square.

There are other issues that may be raised in the future which are unique to small publications and some of those are present in the Crusader story, although unreported in the record. A small journal engaged in protest can be attacked by various branches of the Government without public knowledge, and where a proper defense cannot be financed by the victim as was possible for the large media represented in the Pentagon case. Such Government measures as Williams argues, were applied against The Crusader as a whole, could certainly constitute not only unconstitutional conditions, but also prior restraint, which brings us to the Second aspect of The Crusader case.

Information about these developments were obtained over the years from interviews with the Plaintiffs, research of intelligence relevations now public, and study of recent U. S. domestic and foreign policy. It reveals a concentrated effort by U.S. officials to prevent circulation of dissenting periodicals whether of domestic or foreign origin. The fact that The Crusader case was not resolved for three years compared with the one week complained of in the Pentagon case is significant in this regard, and of no little significance is the fact that the Crusader case was initiated personally by President Johnson's notification to the Postmaster General to take action against that publication.

Another point of interest is that both Williams v. Obrien, and Lamont v. Postmaster General, Supra, involved publications being sent from the Peoples Republic of China to U.S. citizens. In Lamont the publication was the Peking Review being sent to Dr. Corlis Lamor

This raises the issue of Post Office Department and Customs Department complicity in ultra Vires activities revealed in the intelligence exposes to have been a pattern. In addition, there are other factors which contribute to the ideas of the Governments' attempt to censor communications by Williams and The Crusader. All these activities must be considered in light of the Cointelpro and other U.S. intelligence operations against dissenters including illegal mail covers.

Plaintiff Williams, a former N.A.A.C.P. president in Monroe, North Carolina in the late 1950's had been an advocate of Self-Defense against members of the KKK in North Carolina and had subsequently been charged by state authorities with kidnapping members of the Klan, while Federal authorities had charged Williams with flight to avoid prosecution. Williams was among the first Blacks to take exile in Cuba and later in the PRC where he continued his journalism which had left off in North Carolina with The Crusader.

In an interview with Williams, this writer was told that a radio program broadcast from Havana to the U.S. by Williams called 'Radio Free Dixie' had been jammed by electronic means by the Department of the Navy. In addition, a book, Negroes With Guns published by Williams which detailed the civil rights struggle in Monroe, had allegedly been purchased en mass by U.S. intelligence agents. According to some bookstore proprietors, numerous copies had been bought in bulk. Furthermore, according to Williams, one copy of The Crusader had been completely forged, and other copies were the subject of mysterious dissappearances from bookstores and newstands.

It is also interesting that although Williams was informed by Federal authorities of some 20 volumns of files about his activities, he has only been able to obtain a collection by the state of Michigan, but no federal files in spite of solicitations by Michigan Congressmen. The Michigan files, incidently, revealed that state authorities were aware of a plot to assassinate Williams by local Klansmen who were charged with dynamiting a School Bus. State and Federal charges against Williams were dropped after his return to the U.S. in the early 1970's, but the files probably have a large story to tell, and the fact that Amnesty International has called for a commission of inquiry into the effect of U.S. intelligence activities may compell Americans once more to seriously consider the radical doctrine of the First Amendment and the Bill of Rights in general.

Footnotes

¹ Quoted approvingly in Lamont v. Postmaster General, 381 U.S. 301, 305 (1965), p. 1.

² Sigler, Freedom Of The Mails: A Developing Right, 54 Georgetown Law Journal 30 (1965), p. 1.

³ Milton, Prose Works 103-109 (Fletcher ed. 1834), p. 1.

⁴ See Ernst & Schwartz, Censorship - The Search For The Obscene 20 (1964), p. 1.

⁵ S.122, 24th Cong., 1st Sess. (1836), p. 1.

⁶ Cong. Globe, 24th Cong., 1st Sess. 437-42 (1836) at 441. The quoted words are those of the Globe, not Buchanan, p. 2.

⁷ Ch. 270, § 28, 5 Stat. 566, p. 2.

⁸ H.R. 6143, 45th Cong., 2d Sess. (1878), p. 2.

⁹ Ch. 30, 40 Stat. 217, p. 2.

¹⁰ Espionage Act of 1917, Ch. 30, Tit. 12, § 1,40 Stat. 230, p 2.

¹¹ Roth v. United States, 354 U.S. 476, 504 n5 (1957) dissenting opinion, p. 3.

¹² Rogers, The Postal Power of Congress (1916), p. 3.

¹³ 18 U.S.C. § 612 (1964), p. 3.

¹⁴ Masses Publication Co. v. Patten, 246 Fed. 24, 27 (2d Cir. 1917), p. 3.

¹⁵ Ex-parte Jackson, 96 U.S. 727, 733 (1877), p. 3.

16 United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 41 S.Ct. 352, 65 L.Ed. 704 (1921), p. 3.

17 Lamont v. Postmaster General, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed. 2d. 398 (1965), p. 4.

18 376 U.S. 254, 270 (1964), p. 4.

19 18 U.S.C. 1717(a); 957; 1461; 2387 (1964), p. 4.

20 18 U.S.C. 1717(a) (1964), p. 4.

21 18 U.S.C. 1827 (1964), p. 5.

22 Plaintiff's Brief, Page 7, p. 6.

23 Ibid., p. 7.

24 370 U.S. 478, 495-519 (1962, Brennan, J., Warren, C. J., and Douglas, J. concurring, p. 7.

25 Plaintiff's Brief, Page 5, p. 7.

26 Plaintiff's Brief, Page 6, p. 7.

27 274 Fed. 749 (C.C.A. D.C. 1921), error dismissed per stipulation, 260 U.S. 757 (1923), p. 7.

28 Plaintiff's Brief, Page 7, p. 8.

29 Plaintiff's Brief, Page 8, p. 8.

30 Plaintiff's Brief, Page 12, p. 9.

31 385 U.S. 589, 599-600 (1967), p. 11.

- 32 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed. 2d 639 (1962), p. 12.
- 33 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed. 2d 649 (1965), p. 12.
- 34 381 U.S. 301, 305, 307 (1965), p. 14.
- 35 Plaintiff's Brief, Page 23, p. 14.
- 36 Ibid., p. 14.
- 37 Yates v. United States, 354 U.S. 298, 313, 320 (1957), p. 15.
- 38 Milwaukee Publishing Co. v. Burleson, 255 U.S. 407, 414 (1921), p. 15.
- 39 Keyishian v. Board of Regents, 385 U.S. 589, 600, fn. 8 (1967), p. 15.
- 40 18 U.S.C. 957 and 2387, p. 16.
- 41 Signed at Vienna, Article 28, Universal Postal Union Convention of July 10, 1964, TIAS 5881, p. 18.
- 42 Ibid., p. 18.
- 43 Defendants' Brief at Page 21, p. 19.
- 44 Statement of United Nations Representative to General Assembly, Mrs. Franklin D. Roosevelt, made December 9, 1948. 19 Department of State Bill, 751. Subsequently Secretary of State Dulles announced that the United States would not sign any treaty on human rights drafted under United Nations' auspices. New York Times, April 17, 1953, Page 1, Col. 5., p. 19.
- 45 U.S. Code Cong. and Ad. News, 87th Cong., 2d Sess. at 3076 (1962), p. 23.
- 46 U.S. Post Office Department Postal Decisions, 328 (1939), cited in Stanard v. Olesen, supra. at 771, p. 23.

⁴⁷ S. Docket No. 186, 76th Cong., 3d Sess., 22 (1940), p. 23.